In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 49

HARRY W. SIMPSON, EDWARD F. SIMPSON and F. W. SIMPSON, JR., Co-Partners Doing Business Under the Firm Name and Style of SIMPSON CONSTRUCTION COMPANY, *Petitioners*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 18-30) is reported at 102 F. Supp. 562.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1952 (R. 31). The petition

for a writ of certiorari was filed on May 3, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States*, 340 U. S. 8, in holding that the procedures invoked by petitioners under a standard form government construction contract did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act so as to qualify petitioners for the extraordinary benefits provided by that statute.

STATUTORY PROVISION INVOLVED

Section 3 of the War Contract Hardship Claims Act, popularly known as the Lucas Act, adopted August 7, 1946, 60 Stat. 902, 41 U.S.C., Supp. IV, 106, note, provides in pertinent part:

> Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act [August 7, 1946], *and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945*, * * *. [Emphasis supplied.]

STATEMENT

This case arises out of the performance of a government contract for the grading, draining, and seeding or sprigging of the Titusville-Cocoa, Florida, Airport (R. 5-16). The contract contained the usual provisions of standard government construction contracts relating to changes, changed conditions, inspection, and the settlement of disputes concerning questions of fact by the contracting officer (R. 7-9, 12). Liquidated damages for delay were established and fixed by the contract at the rate of $750 per day (R. 10-11, 22).

Notice to proceed was issued effective September 10, 1943 (R. 1). However, neither the first runway nor the entire project was completed within the contract time as extended, and on September 15, 1944, petitioners' right to proceed was terminated (R. 1, 22). Liquidated damages for delay were assessed in the amount of $201,750 (R. 22, Ex. 1, p. 3).

Thereafter, on November 10, 1944, petitioners submitted to the contracting officer named in the contract a claim for elimination of all claims for liquidated damages for delay and for allowance of additional compensation under articles 3 and 4 of the contract on account of additional costs alleged to have been incurred (Ex. 1).[1] On April 16, 1945,

[1] By stipulation (R. 31), the Exhibits have not been printed but have been filed with the Clerk.

the contracting officer rendered his decision on petitioners' claim, allowing petitioners $92,355.24 as additional compensation and remitting a substantial portion of the liquidated damages previously assessed (Ex. 3). Petitioners, on May 21, 1945, and pursuant to the terms of the contract, took an appeal from the contracting officer's decision to the head of the department (Ex. 4). On appeal the contracting officer's decision was generally affirmed except for one item of additional cost, and the net amount allowed petitioners under articles 3 and 4 of the contract was reduced to $74,441.10 (Ex. 5).

On February 3, 1947, petitioners filed a claim under the Lucas Act with the Civil Aeronautics Administration (Ex. 2). The Civil Aeronautics Administration denied petitioners' claim in its entirety upon the ground that the petitioners had not, prior to August 14, 1945, filed a written request for relief for losses within the meaning of Section 3 of the Lucas Act (Ex. 6). Petitioners then instituted this suit in the Court of Claims. At a pre-trial proceeding petitioners submitted the claim presented to the contracting officer (Ex. 1) and the appeal taken from the contracting officer's decision (Ex. 4) as the documents upon which they relied as written requests for relief for losses filed with the contracting agency prior to August 14, 1945. Thereafter, the Court of Claims granted respondent's motion for summary judgment upon the ground that petitioners had not, prior to Au-

gust 14, 1915, filed a written request for relief from losses within the meaning of Section 3 of the Lucas Act (R. 31).

ARGUMENT

1. This case presents the narrow question whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States,* 340 U. S. 8, to the particular facts of this case. We submit that the Court of Claims correctly applied that principle in holding that the claim filed by petitioners with the contracting officer of the Civil Aeronautics Administration and petitioners' appeal from the contracting officer's decision on that claim did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act.

In the *Fogarty* case, *supra,* this Court considered the question whether a claim for compensation for requisitioned property and a number of invoices seeking compensation for goods and services allegedly furnished, all of which had previously been submitted to the Navy Department, constituted written requests for relief within the meaning of Section 3 of the Lucas Act. In its opinion in that case this Court said (340 U. S. 8, 13):

> * * * we think Congress intended the term "written request for relief" to mean written notice presented prior to August 14, 1945, to an agency which was authorized to grant relief under § 201 of the First War Powers Act. Since there is no definition of the term in the

Act or regulations, and since the legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress, no particular form of notice is required. *But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts.* [emphasis supplied.]

The claim submitted by petitioners to the contracting officer of the Civil Aeronautics Administration (Ex. 1) and petitioners' appeal from the contracting officer's decision on that claim (Ex. 4) do not seek extra-legal relief under the First War Powers Act or any other relief as a matter of grace. They seek payment as a matter of right, solely and exclusively under the provisions of the contract.

The action requested by the claim presented to the contracting officer is summarized on the first page of the claim, as "ELIMINATION OF ALL CLAIMS FOR LIQUIDATED DAMAGES FOR DELAY," and "ALLOWANCE OF ADDITIONAL COMPENSATION UNDER ARTICLES 3 AND 4 ON ACCOUNT OF ADDITIONAL COSTS INCURRED." The claim is addressed to the Contracting Officer and opens with the statement, "This communication is directed to you as Contracting Officer named in Negotiated Contract No.

c2ca 2053 * * *." (Ex. 1, pp. 1, 2). The first part of the claim requests remission of all liquidated damages as a matter of right, setting up two alternative grounds for such relief: (1) this Court's decision in *United States* v. *American Surety Company*, 322 U. S. 96 (Ex. 1, pp. 3-4) and (2) a contention that all delay was caused by the Government or by unforeseeable causes (Ex. 1, pp. 4-16). The balance of the claim consists of separate claims for individual items, each of which is specifically captioned as a claim for additional compensation under articles 3 and 4 of the contract (Ex. 1, pp. 17, 27, 29, 31). Moreover, petitioners included a claim for the cost of work performed for the purposes of inspection, stating that, "While this claim arises under Article 6(c) [of the Contract] instead of Article 3 or Article 4, it is inserted here because it is included in the statement of total costs." (Ex. 1, p. 29).

That petitioners thought of these claims as judicially cognizable claims is evidenced by the copious citations of court decisions (Ex. 1, pp. 3-4, 8-9, 14-15, 18, 22) and decisions of the War Department Board of Contract Appeals (Ex. 1, pp. 19, 20, 21, 28, 30-31) set out in the claim filed with the contracting officer. Despite the legal basis on which petitioners thus sought to establish their claims and on which they did receive payment of part of their claims, petitioners now point to certain demands for equitable adjustments contained

in the claim filed with the contracting officer (Pet. 10). Petitioners contend that these demands constitute general claims for extra-legal relief under the First War Powers Act. However, as found by the Court of Claims (R. 29), such demands were requests for equitable adjustments referred to in Article 3 of the contract (R. 7) and implicit in the terms of Article 4 (R. 7-8);[2] they were intended as such by petitioners (see Ex. 1, pp. 17-18) and so understood by the contracting officer.

Nor does the appeal taken by petitioners from the contracting officer's decision constitute a written request for relief within the meaning of Section 3 of the Lucas Act. The appeal specifically states, "All parties to said cause are notified and called upon to take notice of the entry of this appeal under and by virtue of the terms and provisions of Article 15 of said contract." (Ex. 4, p. 2). Like the claim submitted to the contracting officer, the appeal demanded equitable adjustments pursuant to articles 3 and 4 of the contract as a matter of right. It contained no intimation that the Civil Aeronautics Administration "was being asked to grant extra-legal relief under the First

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[2] Article 3 expressly provides for an "equitable adjustment" in the event of certain changes in the drawings or specifications and provides for submission of claims for such adjustments to the contracting officer, and, in the event of dispute, to the head of the Department pursuant to Article 15 (R. 12). Article 4 provides for modification of the contract in the event of certain changed conditions. See *United States* v. *Callahan Walker Constr. Co.*, 317 U.S. 56; *United States* v. *Rice*, 317 U.S. 61, 67.

War Powers Act for losses sustained in the performance of war contracts."

Petitioners contend, however, that articles 3 and 4 of the contract do not give rise to contractual rights (Pet. 8, 11, 15) and that they merely incorporated the powers granted the Civil Aeronautics Administration by the First War Powers Act and Executive Orders 9001 and 9116 (Pet. 7, 8, 15). That the argument for such incorporation is fallacious is manifest from the fact that the standard government construction contract as revised on September 9, 1935, contained articles 3 and 4 identical with those in petitioners' contract. 41 CFR 12.23 (1st Ed., 1939). Moreover, contractual provisions for the final settlement of disputes such as those in petitioners' contract have long been used by the Government and their validity sustained by this Court. *United States* v. *Wunderlich,* 342 U. S. 98; *United States* v. *Moorman,* 338 U. S. 457, 460-462. Such contracts give rise to contractual liability on the part of the Government, *United States* v. *Mason & Hanger Co.,* 260 U. S. 323; *United States* v. *Northeastern Construction Company,* 260 U. S. 326; just as they do in cases where private parties have utilized such provisions. *Sheffield etc. Railway Co.* v. *Gordon,* 151 U. S. 285; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185.

Accordingly, the Court of Claims was correct in concluding that the claim filed by petitioners with

the contracting officer and petitioners' appeal from the contracting officers' decision did not seek extra-legal relief under the First War Powers Act or any other relief as a matter of grace, but instead sought payment as a matter of right, solely and exclusively under the provisions of the contract. Under the rule laid down in *Fogarty* v. *United States,* 340 U. S. 8, neither of those documents was a "written request for relief" within the meaning of Section 3 of the Lucas Act.

2. There is no conflict. Although petitioners contend that the decision of the Court of Claims in the case conflicts with previous decisions of that court (Pet. 13), the decisions of the Court of Claims cited by petitioners [3] were all decided prior to this Court's decision of the *Fogarty* case, *supra,* on November 6, 1950. Contrary to the implication contained in petitioners' contention, the decision of the Court of Claims in this case is in accordance with and supported by decisions of Court of Claims rendered since this Court's decision of the *Fogarty* case, *General Cas. Co. of America* v. *United States,* 101 F. Supp. 753 (C. Cls.); *Pennington* v. *United States,* 118 C. Cls. 610, 95 F. Supp. 817, as well as

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[3] *Howard Industries* v. *United States,* 83 F. Supp. 337 (C. Cls., 1949); *Milwaukee Engineering & Shipbuilding Co.* v. *United States,* 83 F. Supp. 348 (C. Cls., 1949); *Modern Engineering Co.* v. *United States,* 83 F. Supp. 346 (C. Cls., 1949); *Spicer* v. *United States,* 83 F. Supp. 345 (C. Cls., 1949).

the decisions of other courts, *Davidson* v. *United States,* 185 F. 2d 897 (C.A.D.C.); *Evans* v. *United States,* 101 F. Supp. 436 (E.D. Mo.); *Acme Fur Dressing Co.* v. *United States,* 80 F. Supp. 927 (E.D. N.Y.); *F. G. Vogt & Sons* v. *United States,* 79 F. Supp. 929 (E.D. Pa.). Moreover, contrary to petitioners' contention that the Court of Claims has extended the *Fogarty* decision far beyond its intent by narrowly restricting the claims which will be recognized as requests for relief (Pet. 18), other recent decisions of the Court of Claims show that it has considered the facts of each case and, in cases in which it believed such a construction was possible, the Court of Claims has applied a very liberal interpretation of the *Fogarty* decision for determining what constitutes a request for relief. *Humphrey* v. *United States,* 101 F. Supp. 759 (C. Cls.); *McKenzie* v. *United States,* 96 F. Supp. 944 (C. Cls.).[4]

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[4] Petitioners also contend that the decision of the Court of Claims in this case is inconsistent with the provision of Section 3 of the Lucas Act that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." (Pet. 12). However, the question presented in this case is not whether a settlement made pursuant to the terms of the contract bars further relief under the Lucas Act but whether the petitioners' claim of contractual rights constituted a written request for relief within the meaning of Section 3 of the Lucas Act. Accordingly, no question of the applicability of the above-quoted provision is here presented.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. [redacted] 49

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF SIMPSON CONSTRUCTION COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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Counsel for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

No. 750

HARRY W. SIMPSON, EDWARD F. SIMPSON AND F. W. SIMPSON, JR., CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF SIMPSON CONSTRUCTION COMPANY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

The Government's Brief says that the "sole question for decision" here is whether the Court of Claims correctly applied "the *principle* of Fogarty v. U.S., 34 U.S. 8, to the *particular facts* of this case;" but it does not distinguish between the "particular facts" of this case and the "particular facts" of the Fogarty case; it nowhere states "the principle of the Fogarty case," which the Court of Claims applied; it uses vague generalizations instead of the clear-cut distinction that exists between the invoices and bills filed by Fogarty prior to August 14, 1945 and Exhibits 1 and 4 filed by Petitioners prior to August 14, 1945.

First, we direct the Court's attention to the fact that the decision of the Court of Claims was that it had *no jurisdiction* over this proceeding. In its consideration of the Motion of the Government for summary judgment, the Court was restricted to pleadings and exhibits; that Motion also neces-

sarily admitted all material allegations of the Petition and Exhibits, among which were the following:-

(a) That Petitioners suffered a loss in the performance of their contract with the Government in an amount equal to the total original bid price (Exs. 1 and 4);

(b) That their loss was not the result of any fault or negligence on their part (Petition and Exs. 1 and 4) but was due to errors of Government officials in charge of the work, to changes made by them in the plans and specifications, to the fact that work not included in the plans and specifications was ordered to be performed, and for other reasons which, because of the express terms of Art. 3 of the contract did not "excuse the contractor from proceeding with the prosecution of the work so changed." The contractors proceeded with the work as ordered until they were required to desist therefrom;

(c) That the total cost to Petitioners for the actual performance of the work ordered was the reasonable cost of performing such work (Ex. 1, and specially Ex. 27 attached thereto);

(d) That Exhibits 1 and 4 were filed by Petitioners prior to August 14, 1945, with the contracting officer (Par. 4, p. 2 R) who, at that time, under the provisions of the First War Powers Act, had authority to grant "equitable relief from loss" as a "matter of grace,"—"extra legal relief"—to "alleviate hardships" imposed upon the contractors;

(e) That Exhibits 1 and 4 did expressly request relief for the loss incurred by them,—specifically for reimbursement of the amount expended by them in excess of the bid price.

On the contrary, the documents in the Fogarty case which were filed prior to August 14, 1945 and relied upon as "written requests for relief from loss" were "invoices and bills" for work performed, computed in accordance with the express terms of a contract, or for the value of property requi-

sitioned by the Government. This Court, in affirming the decisions of the lower courts, held that:

(a) These were "legal claims" as distinguished from "equitable claims for losses incurred in the performance of the contract;" the Court of Appeals had held that they were claims for which Petitioner had "a right to maintain an action at law against the Government" under Secs. 1346 and 1491, Title 28, U.S.C.A.;

(b) They were not "written requests for relief from losses;" for they did not allege that Petitioners had incurred a loss.

(c) The Lucas Act deals with an entirely different character of claims; those for which "the United States was never, by force of contract, obligated to pay, but which, like the First War Powers Act, contemplated relief of grace and not in recognition of legal rights."

Neither the Court of Claims nor the Brief of the Government recognizes these radical differences between the documents filed by Fogarty and those filed by the Petitioners; nor that under the express statements in the opinions of the Courts in that case, Exhibits 1 and 4 of this case were not "legal claims." Decision of that question,—"the sole question of law in this case,"—was evaded by calling them "contractual claims" based upon Articles 3 and 4 of the contract, in which the Government agreed to "equitably adjust" compensation under the circumstances therein stated. The Court of Claims did not hold, and the Government's Brief does not assert,—because they could not—that Petitioner could have maintained an action at law against the United States on either Exhibit 1 or Exhibit 4 for the loss it sustained—the amount by which the cost of the work performed exceeded either the bid price or that price plus the "adjustment" made by the contracting officer.

On the contrary, the Brief (p. 9) relies upon decisions of this Court which held that provisions similar to those of Art. 15 of Petitioners' contract are valid. It cites U.S. v. Moor-

man, 338 U.S. 457, where this Court reversed the Court of Claims because it reconsidered the facts and allowed Petitioners more than had been allowed by the contracting officer. Apparently the Government did not realize that those cases also held that where such a clause is included in the contract there can be no "legal claim" by the contractor against the Government under such clauses as Articles 3 and 4, upon which an action at law can be maintained, until the contracting officer has determined the amount. (U.S. v. Callahan-Walker Construction Co., 317 U.S. 56-61.) If no allowance be made, the officer's decision is conclusive that the contractor has no *legal claim* thereon and can recover nothing.

The opinion of the Court of Claims and the Brief of the Government both insist that the allowance made by the contracting officer to Petitioners was only under Articles 3 and 4 of the contract, but impliedly admit (Note 4, p. 11 of the Brief) that that allowance was not final or conclusive, because under Sec. 3 of the Lucas Act "a previous settlement shall not preclude further relief otherwise allowable" under that Act.

The contracting officer's report (Ex. 3) did not refer to powers granted him by the First War Powers Act, nor did he purport to utilize those powers to grant relief to Petitioner from loss. The Court of Claims held that this was evidence (?) that Exhibits 1 and 4 were "contractual claims," implying,—but carefully refraining from deciding, —that they were "legal claims." This it did, notwithstanding the fact that the sole question before the Court was one of its jurisdiction to grant "further relief." The Court of Claims strictly construed the detailed terms, specifications, unit prices, etc. of the contract as if it were retrying the merits of an action at law upon the contract, construed the contract strictly and resolved all doubts against Petitioners. If this were the purpose of the Lucas Act, why did that Act provide that a settlement on the contract did not preclude further relief by the Court of Claims as a "matter of grace"

to "alleviate hardships" imposed upon the contractor by the Government? This was not proper matter to be considered in connection with a decision as to whether the Court had jurisdiction of the Petition, much less to support the entry of a summary judgment against the Petitioner, denying it even an opportunity to present evidence of the facts alleged.

The Court of Claims did not, by express language, reverse its previous decisions, but its decision was wholly inconsistent therewith. (See pp. 14 and 15, former Brief.) The Government's Brief impliedly admits this by saying that those decisions were rendered before the decision in the Fogarty case. Yet, neither the Brief nor the opinion of the lower court attempts to show or explain why the Fogarty decision required such a change in its application of the Lucas Act.

The Government also says, that since the decision in this case the Court of Claims has "applied a very liberal interpretation of the Fogarty decision for determining what constituted a request for relief." This is another broad generalization without definite meaning. But it necessarily implies that the Court of Claims now determines its own jurisdiction in each case by an exercise of its discretion rather than according to the rule of law adopted by this Court; that it does not enforce the distinction made in the Fogarty opinions between "legal claims" on the one hand and "equitable claims for losses in the performance of the contract" on the other; in short, it does not apply the "principle" upon which the Fogarty case rests. As a result, the confusion caused thereby in that Court's subsequent decisions is now apparent from the opinions in Depew Paving Co. v. U.S. where the dissent is by the writer of the opinion in this case. DePew Paving Company has filed a Petition for a Writ of Certiorari to review that decision alleging that it is inconsistent with the decision in this case as well as with that of the Fogarty case.

The Writ of Certiorari should be granted.

Respectfully submitted,
Counsel for Petitioners

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Patterson